Comments on OEHHA's Conceptual Regulation Proposing to Exempt from the Proposition 65 Warning Requirement All Chemicals Formed From Natural Constituents in Food During Cooking or Heat Processing

Submitted By

The Environmental Law Foundation

On Behalf of CLEEN

June 6, 2005

Table of Contents

The Environmental Law Foundation, submit these comments as part of the Office of Environmental Health Hazard Assessment (OEHHA)'s May 9, 2005 public workshop to explore potential action to amend regulation implementing the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as "Prop 65."[1] These comments are submitted on behalf of the California League for Environmental Enforcement Now (CLEEN) and its members. The California League for Environmental Enforcement Now is a statewide coalition of environmental and public health organizations, advocates and law firms committed to protecting and strengthening laws regulating toxic pollution and keeping drinking water safe.

The members of CLEEN include the Environmental Law Foundation, Natural Resources Defense Council, Citizens for a Better Environment, Center for Environmental Health and others. The complete list is included in the final page.

1 Health and Safety Code §§ 25249.5 et seq. No actual regulation has been formally offered. Rather the agency has offered a proposal for discussion purposes only that has been sought by the food manufacturing, sales and service industries. Neither OEHHA nor any other agency has in fact formally proposed such a regulation. It will be referred to throughout these comments as the "industry proposal."

I. SUMMARY OF ARGUMENT

The food industry is demanding that the agency adopt a proposal ("industry proposal")[2] that would entirely exempt from the Proposition 65 warning requirement all chemicals that form from natural constituents in food during cooking or heat processing. The industry proposal would include all chemicals now on the on the Governor's list of chemicals known to cause cancer, birth defects or other reproductive harm, as well as yet unknown chemicals that might be listed in the future. The exemption would not, by definition, be based on any scientific assessment of the presence of such chemicals, the level of exposures, risks of cancer or birth defects, or indeed on any scientific data or factors whatsoever. Rather it would be driven entirely by the policy preferences and the economic interests of the food industry. The effect would be to conceal from consumers the presence of such known and as yet unknown chemicals in any amount in all foods.

The industry proposal directly conflicts with the language of Proposition 65 and its implementing regulation at 22 C.C.R. Section 12501. The statute admits of no categorical exemptions to the warning requirement where the

2 While the language generated for discussion purposes at the May 9 workshop was generated by the Agency, the impetus for the proposal is coming entirely from the food manufacturing and retailing industry, with support from various agricultural and other industries.

exposure occurs as a result of any known and intentional human activity. It is also a logical fallacy, since the industry proposal would state a demonstrable falsehood, i.e., that "no exposure" occurs where there clearly is an exposure.

This approach – a complete exemption untethered to the law – has been squarely rejected by the Court of Appeal in *Nicole Wagner v. Deukmejian*, 230 Cal.App.3d 652 (1991) and the Sacramento Superior Court in *AFL-CIO, et al. v. George Deukmejian, Governor of the State of California, et al.*, Sacramento Superior Court No. 502541 (judgment entered for plaintiffs April 16, 1990) ("*Duke II*")

Moreover, the agency is under a binding legal obligation to the litigants in *Duke II* not to seek to adopt any regulation that categorically exempts food based on a determination of no significant risk unless it establishes specific numeric levels that are based on sound science from state or federal authorities. As noted, this proposal is not based on any scientific data at all.

None of the industry arguments in favor of the amendment are valid, and in fact they are self-contradictory. The principal reasons for the proposed regulation are two-fold. Either (1) many or most consumers will read and heed any warnings on food products, and thereby potentially avoid otherwise healthful products

needed for good overall nutrition, or (2) such warnings will be so ubiquitous that they will be disregarded by most or all consumers and hence provide no health benefit. Leaving aside that no industry representative has offered any evidence that either of these speculative concerns has any factual basis at all, they are self-canceling. Either consumers will or will not read and take action on warnings, but a policy cannot be based on the assumption that they will do entirely contradictory things. Unless, of course, consumers will each act in individual ways that suit their particular levels of concern, risk-aversion and interests. That kind of choice, of course, is what underlies the law not only of Prop 65 but our entire system of consumer sovereignty. The industry proposal, if based on these two rationales, presupposes that *whatever* a consumer might do will be wrong and therefore all information about these chemicals should be concealed from consumers when making their choices.

Equally contradictory is the apparent position, based on fact and law, that no such exemption is needed. While industry is demanding an exemption, there is nothing to date to show that it is in fact needed. There is not a single foodstuff these parties have been able to find that carries any Prop 65 warning about acrylamide or any other listed chemical. Not one. Acrylamide has been on the Prop 65 list since 1991, and its presence in some foods has been well

documented by numerous domestic and international experts for over three years. Yet not one company has ever placed a warning regarding the presence of acrylamide. Some representatives of the food industry have candidly committed to the position that various legal theories already relieve the companies of any warning obligation. Since industry apparently feels no need to provide warnings, the dire need for any exemption is dubious at best.

Rather than adopting the industry's choice of concealment and hiding information from consumers – a purpose that runs directly in the face of the statute's purpose – the agency should adopt such regulations that will instead rest on policies designed to inform and reform. Inform consumers and the general public, and produce incentives to the industry to reform their practices to minimize if not eliminate in the food supply chemicals that cause cancer and birth defects.

II. OEHHA HAS NO AUTHORITY TO CREATE EXEMPTIONS TO PROP 65

The industry proposal would attempt to legally exempt from the statute's warning requirement *all* exposures to listed chemicals that cause cancer, birth defects or other reproductive harm, if they are "formed solely from constituents naturally present in food and as a result of the food being cooked or heat processed, ..."[3] The proposal as phrased for discussion attempts to exempt chemicals that unquestionably are the product of human activity. This approach conflicts with Proposition 65, existing case law interpreting it, and does not promote the purposes of the law as expressed and approved by the People.

A. OEHHA Has No Legal Authority to Grant an Exemption

OEHHA has been charged by the Governor, per section 25249.12(a), as the "lead agency" for Proposition 65 implementation. As such it has power to propose what chemicals should be listed, and adopt implementing regulations where the statute is silent or ambiguous. In short OEHHA may adopt defining regulations.[4]

---

3 April 8, 2005, Notice to Interested Parties, *New Section _____, Chemicals Formed From Natural Constituents in Foods* at 2.

4 Notably, while as a lead agency OEHHA is empowered to "adopt and modify regulations, standards, and permits as necessary to conform with and implement this chapter," it can do so only "to further its purposes." Section 25249.12(a). A wholesale exemption from the warning requirement under a right to know law that would mask a host of known and unknown chemicals found in major class of consumer products – food – scarcely furthers the purpose of the statute.

Nowhere is OEHHA granted the power to entirely exempt from the statute's commands entire classes of chemicals, exposures or products. That power simply does not exist. The only example in which the agency has been held by a court[5] to adopt anything like this was when the agency defined "exposure" so as to exclude from the statute's coverage exposures to listed chemicals that occur from entirely non-anthropogenic (human) sources and activity. That case, ***Nicolle-Wagner[6],*** is discussed in more detail below.

But the aim of the regulation there – to define what is and is not an "exposure" for purposes of determining whether a warning is required – is fundamentally different from the industry proposal here. As framed by the agency, this would not define any part of the statute. It would instead simply adopt a blanket exemption from the law's requirements for a class of chemicals that appears in a particular medium, food. A regulatory agency, absent express authority in the statute itself, cannot by regulation adopt exemptions to the statute.

As the Court of Appeal in ***Nicolle-Wagner*** noted:

---

5 There are some purported exemptions dealing with certain regulations that address sources of contamination to sources of drinking water under section 25249.5, such as from agricultural pesticides and landfills, but these have never been tested in court.

> Where a statute empowers an administrative agency to adopt regulations, such regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. *The agency has no discretion to promulgate a regulation that is inconsistent with the governing statute. Administrative regulations that alter or amend the statute or enlarge or impair its scope are void* and courts not only may, but it is their obligation to strike down such regulations.[7]

The industry proposal – to conceal the presence of chemicals known to cause cancer and birth defects – under a statute whose principal purpose is to give warnings to people about exposure to just such chemicals,[8] unquestionably would "alter or amend the statute, or . . . impair its scope." As such, if the agency adopts such a regulation it will be void.

B. The Industry Proposal Finds No Support in Existing Case Law Under Prop 65

---

6 230 Cal.App.3d 652 (1991).

7 Id. at 658 (emphasis added).

8 The initiative as passed by the People made some express findings and declarations that any regulation must conform to. Among others, Prop. 65 declares the rights of the people:

> a. To protect themselves and the water they drink against the chemicals that cause cancer, birth defects, or other reproductive harm.
> b. To be informed about exposures to chemicals that cause cancer, birth defects and other reproductive harm.
> c. To secure strict enforcement of laws controlling hazardous chemicals and deter actions that threaten public health and safety.

Preamble, Section 1 of the Initiative.

In addition, of course, the key operative provision requires that any person in the course of doing business give a clear and reasonable warning before exposing any person to a chemical known to the state to cause cancer or reproductive toxicity, unless a specified *statutory* exemption applies. Section 25249.6.

Neither the purposes of the law nor the statute itself is served by an exemption where no warnings at all are given for an

In 1988 OEHHA's predecessor, the Health and Welfare Agency ("HWA"), promulgated an exception to Prop 65's warning requirement. California Code of Regulations Title 22, section 12501 provides that

> human consumption of a food shall not constitute an 'exposure' for purposes of Health and Safety Code § 25249.6 to a listed chemical in the food to the extent that the person responsible for the contact can show that the chemical is naturally occurring in the food.[9]

A chemical is considered "naturally occurring" if "it is a natural constituent of a food or if it is present in a food solely as a result of absorption or accumulation of the chemical which is naturally present in the environment in which the food is raised, or grown, or obtained. . . ."[10]

That regulation was challenged and received judicial approval in the *Nicolle-Wagner v. Deukmejian* decision. In that case plaintiff argued that the regulation was inconsistent with the statute because Proposition 65 created no categorical exemption for "naturally occurring" carcinogens or reproductive toxins.[11] The agency argued that while the statute regulates all listed chemicals, warnings are required only when a business "exposes" an

---

entire class of listed chemicals in an entire group of products.

9 22 C.C.R. § 12501(a)

10 22 C.C.R. § 12501(a)(1)

11 *Nicolle-Wagner*, supra, 230 Cal. App.3d at 657.

individual to a listed chemical. "Exposes" is not defined in the statute. Therefore, the case turned solely on whether the agency's definition of "exposure" conflicted with the statute or its purposes.[12]

The court carefully considered the statutory language as well as the ballot arguments in favor of and against the measure. For example, considering Prop 65's controlling language that "no person in the course of doing business shall knowingly and intentionally expose any individual," the court found that some degree of human activity which results in toxins being added to the environment is required for application of the statute.[13] Where, as with the "naturally occurring" regulation, no human activity is involved in creating the exposure, no warning requirement arises.

Moreover, the argument that the measure applies to man made, rather than entirely natural, carcinogens was part of the materials before the voters in 1986. One of the ballot arguments against Proposition 65 claimed that "*manmade carcinogens* represent only a tiny fraction of the total carcinogens we are exposed to. . . . "[14]

---

12 Id. at 659.

13 Id. at 659.

14 Id. at 659 (emphasis in original).

Finally, the court noted that the regulation was narrowly tailored to define "naturally occurring" so as not to include any exposures to chemicals that are in whole or in part the product of human activity.[15]

Based on the foregoing, the Court of Appeal held that Section 12501 was not in conflict with the statute.

Industry would like to extend that ruling to include man-made chemicals, that is, chemicals to which there is an exposure because of human intercession or activity. Under *Nicole-Wagner,* however, Prop 65 only admits of an exemption to naturally occurring chemicals.[16] Nothing in the court's opinion would sanction a wholesale exemption, i.e. that "no exposure occurs," for chemicals that by definition are only the result of human activity. The decision stands for precisely the opposite principle.

---

15 Id. at 661.

16 Industry finds comfort in language in the opinion that, in the absence of a regulation that naturally occurring chemicals are not covered by the law, "grocers and others would be required. . .to post a warning label *on most, if not all, food* products. . .Since one of the principal purposes of the statutes in question is to provide 'clear and reasonable warning' of exposure to carcinogens and reproductive toxins, such warnings would be diluted to the point of meaninglessness if they were to be found *on most or all food* products." 230 Cal.App.3d at 661 (emphasis added). That language has no application here. Even as to the most ubiquitous chemical that results from cooking – acrylamide – the representative representing the largest coalition of industry members candidly testified at the workshop on industry's proposal that only "a sliver" of the food supply requires a warning in the absence of their requested exemption. A "sliver" is far different from "most, if not all, food."

Industry's proposal turns the case and Section 12501 on their heads. Instead of the exemption for "naturally occurring" chemicals, industry seeks to exempt chemicals that are demonstrably and by definition the result of human activity, that is, cooking or heat processing, to which people are exposed and therefore require a "clear and reasonable warning" under the law. As the Nicole-Wagner court cautioned, "[t]he agency has no discretion to promulgate a regulation that is inconsistent with the governing statute. Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations."[17]

In contrast and addition to the "naturally occurring" regulation, OEHHA's predecessor agency HWA promulgated a regulation that purported to "exempt" from Prop 65 warning requirements all food, drugs and cosmetics regulated by the Federal Food and Drug Administration. *See* former Cal. Code of Regulations Title 22, section 12713.

The regulation was immediately challenged by a coalition of groups, including the American Federal of Labor-Congress of Industrial Organizations, the Natural Resources Defense Council, Environmental Defense Fund,

17 Id. at 658.

Sierra Club and others.[18] The regulation was struck down by the Sacramento Superior Court on the grounds that the agency had no authority to adopt exemptions from the law, regardless of the motivation, purpose or theory.

While the decision was on appeal, this agency as the successor to HWA entered into a settlement to repeal the regulation. Therefore the trial court's opinion was never affirmed in an opinion by the Court of Appeal to become binding precedent under California law. Nonetheless the ruling of law there is still good law. First because the decision ran against this agency and the reasoning is directly on point with the industry proposal here. There is no conceptual difference between the regulation there and that proposed here: an exemption from the law for an entire class of chemicals in a particular medium, food.

Second, this agency entered into a settlement agreement with the entire coalition of plaintiff groups by which it expressly agreed that it would not adopt any "significant risk level" for food unless it was based on explicit state or federal scientific data and standards and created

---

18 *AFL-CIO, et al. v. George Deukmejian, Governor of the State of California, et al.*, Sacramento Superior Court No. 502541 (judgment entered for plaintiffs April 16, 1990) ("*Duke II*").

The plaintiffs were the AFL-CIO, Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, Public Citizen, Campaign California, Citizens for a Better Environment, Silicon Valley Toxics Coalition, and Bernardo Huerta. Eventual defendants were then Governor Wilson and then Director of OEHHA, Carol Henry.

"specific numeric standards for [each] chemical."[19] This industry proposal is expressly divorced from any science or standards whatsoever. Rather than establish a defined "No Significant Risk Level" this proposal would define all the chemicals in food that result from cooking as having, by definition, "no significant risk" at *any* level. That is, the industry proposal would establish *no* "specific numeric standards" for *any* chemical (unless infinity is treated as a specific numeric standard). The parties to the earlier agreement will have no difficulty adding to the legal challenge to any regulation that includes the industry proposal, a two pronged attack: the regulation has no legal basis in the statute and the agency has already made a legally binding commitment not to adopt such a regulation.

In the face of directly contrary legal authority, it is folly for the agency to even consider the industry proposal. It will simply never be adopted into law and the agency's time and resources would be wasted in adopting, defending, losing and paying for this effort. Resources are better spent finding solutions than inventing new problems that lead nowhere.

III. INDUSTRY's JUSTIFICATIONS FOR THE REGULATION ARE INADEQUATE

A. Heat Is Not A Special Case

The industry proposal is absurdly broad. Industry

19 Settlement Agreement at 3, paragraph 13.

wants to exempt not only the chemical subject to the current controversy, acrylamide, but seeks attempts to exempt *all* chemicals (carcinogens and reproductive toxins) formed as the result of cooking or heat processing. This would include not only chemicals known today to be in food, but also other chemicals on the list not yet known to be in food, as well as chemicals not yet on the lists that may be in food. It is worth remembering that acrylamide was on the list for over a decade before it was discovered in food. To create an exemption for carcinogens or reproductive toxins the agency is not even aware of is absurd. What if we learn years from now that there is a popular baby food, heat-dried cumquats, that through heating creates a seriously potent carcinogen? Why would people who care about carcinogens in food exempt chemicals formed through the process of heating when heat is necessary to drive most chemical reactions? This is patently absurd.

The industry proposal is also fundamentally unworkable. Merely defining what “cooked” and “heat processed” means will be an endless and arduous task. Language used to describe cooking is often the same language used to make chemicals. Plastics are “cooked” in “kettles” (reactors), for example.

Moreover, there is no basis for exempting chemicals formed through the application of heat. Heat is completely necessary in the world of chemistry. Heat is not a special

case. There is nothing special about it. Most, if not all, industrial chemicals are formed through the application of heat. More telling, heat is often the critical element that results in the creation of a carcinogenic chemical. Heat is often the thing that turns a "natural chemical" into one that can cause cancer. Once OEHHA opens the door to allow exemptions for chemicals formed in food through the application of heat, there is no telling what creative chemical industry lawyers will push through that door.

A simple example illustrates all these defects. Cigarettes are largely comprised of a natural ingredient: tobacco. That is no different conceptually than any other food crop. There are carcinogens that are created and released when the tobacco is subjected to heat, i.e., fire. Again, this is no different conceptually from carcinogens created when the raw agricultural product is necessarily subjected to heat to render it useful to humans. Last, the product is directly consumed, just as food is. Industry representatives offered several make-weight justifications for why an exemption from Prop 65 warnings is "consistent" in their eyes with Prop 65. Leaving aside the intellectually shabby and self-contradictory arguments relating to speculation about consumer responses to warnings, which are addressed below, the chief justifications offered to try to harmonize a complete exemption from warnings under a right to know law were: this

chemical arises from a natural source; the human activity here is needed to make the agricultural product consumable by humans; the carcinogens are an "unintended" byproduct of heating; the carcinogens cannot be eliminated and therefore should be ignored. Every one of those arguments would also support keeping warnings off of cigarettes. And make no mistake: the position advanced by this exemption is the same type of position that so spectacularly failed in the defense of tobacco. The modus operandi is the same: hide facts, proffer self-defeating and contradictory rationales, deride all sound science from national and international experts in favor of junk science from paid mouthpieces, while promoting the view that "nothing should be done until we know all the facts and more science is in." And most of all, the goal is the same: *don't tell people that this product has a cancer causing chemical*. OEHHA should firmly decline the invitation to repeat the experience.

B. OEHHA's Authority Is Limited to Implementing Proposition 65 Regarding Exposures to Cancer and Reproductive Toxins, Not Regulating Generally On Nutrition

The industry's first justification for the proposal is that warnings on food might cause some consumers to avoid foods that may be necessary for a balanced diet. The justification is inadequate for three reasons.

First, OEHHA has no authority or expertise to examine, evaluate or regulate general public health effects from

food. OEHHA is charged under Prop 65 with addressing exposures to carcinogens and reproductive toxins, but not generally to regulate consumer behavior with regard to nutrition. The charge under the statute is a limited one, and OEHHA is being invited to stray well beyond its mandate.

Second, even if OEHHA were legitimately authorized to regulate nutrition and consumer behavior generally, the industry proposal regulation is overbroad in that it includes foods that are low in nutrition but high in cancer causing chemicals. For instance, acrylamide, the chemical supplying the impetus for this proposal, appears in the highest concentrations in edible form in food such as potato chips and french fries, foods no one can with a straight face argue are part of a healthy and balanced diet. Indeed, one of the highest acrylamide levels found by the FDA in an edible food product were in "mesquite flavored" Pringles potato crisps.[20] That product isn't a natural product nor is it considered part of a healthy diet – it's an entirely processed and manufactured food stuff.

Third, this gives rise to a strong counter argument to the proffered rationale. If OEHHA is in fact empowered to adopt regulations to implement Prop 65 that take into account other nutritional, public health and consumer behavior issues, then it must take into account *all* the

20 Cite to FDA data; give amount; compare to existing NSRL.

nutritional, public health and consumer behavior issues raised by the affected products. Thus, by way of example, OEHHA should take into account the public health effects on obesity, heart disease, diabetes and other well-known health effects of foods that are high in calories, fats, transfats and sugar. Put simply, rather than completely exempting all foods in which acrylamide appears in order to protect public health, OEHHA would have to examine whether potato chips, french fries, highly sugared cereals and other such foods are in fact necessary for a nutritious diet. OEHHA could easily conclude that the health effects of those foods would in fact suggest inclusion of the Prop 65 warning as a positive health benefit. While the Lay's company, Procter & Gamble, McDonald's and Burger King might take umbrage, they cannot simultaneously argue that OEHHA should take into account generalized health benefits from eating some grains and starches but completely ignore the facts that the methods of preparation of those foods that lead to high acrylamide levels also have other serious public health affects. In short, a half hearted look at overall nutritional effects may well be worse than none at all.

C. OEHHA Has No Authority To Exempt A Class of Products From Warnings Because Some Posit People Won't Read Them

The second offered rationale for the industry proposal is that warnings will be so ubiquitous that consumers will

simply ignore them. As with the former rationale, not a shred of evidence has been offered to support this factual belief.

But even if there were, there is nothing in Prop 65 that exempts a product, chemical or type of exposure because people might not act on the warning. Prop 65 is premised on the belief that the people have the right to the information. As approved by the voters, Prop. 65 declares the rights of the people "to be informed about exposures to chemicals that cause cancer, birth defects and other reproductive harm." It does not say anything about what any individual consumer should or must do with the information. Nor is there anything in the statute that says that if consumers will not use the information that it must therefore be withheld from them. Prop 65 is premised on the belief that individuals deserve the information and are entrusted to make their own decisions about what to do with that information.

Nothing in the statute that says that precisely because a chemical occurs in many products, that this is a sound reason to entirely conceal the fact of these ubiquitous exposures. To state the proposition is to negate it. To exempt from warnings those very chemicals that result in a large variety of exposures is to render the statute a nullity in the very place it is most needed.

Moreover, this very issue – overwarnings and "warning

fatigue" – were placed before the voters as reasons *not* to adopt Prop 65. The ballot arguments against Prop 65 included strong cautions that Prop 65 would result in a plethora of meaningless warnings. Thus the voters were informed that Prop 65 might, if adopted, result in "warning fatigue." The voters therefore knew that and adopted the measure anyway. It is simply perverse to return twenty years later and cite, as a basis for supporting the statute, the very reason the opponents cited as the basis for opposing the statute. Put simply, the issue of overwarning or warning fatigue was part of the political campaign almost twenty years ago. The voters were confronted with it, knew it, and rejected it. It is time to stop reissuing the same bromides from 1986 and confront the issues in 2005. In short, enact and implement the will of the voters, do not thwart it.

D. The Arguments Make No Logical Sense

Taken separately, the policy arguments for the industry proposal make no legal or factual sense. They have been rejected by the courts. They have no moral sense in that they directly contradict the will of the voters.

They are also logical nonsense.

The industry needs to put forward a rationale for their proposal that has some basis in fact – supported by evidence – and which does not negate itself. Put simply, the two arguments proffered by industry are premised on the belief

that the law currently requires warnings on many food items. From this they simultaneously argue that this will lead many consumers to read and heed the warnings, and avoid nutritious foods. Conversely, they argue that people will ignore the warnings.

The industry needs to get its story straight. It also needs to support whatever story it uses with facts and evidence, not speculation and supposition.

But likely the answer lies between the industry's extremes. Some people will see the warnings and, based on their own diet, risk aversion, immune-compromised condition, concern for their children, age, culture and a host of other factors decide to take avoidance action on some products, while others will not. That is exactly what the statute is intended to do: give consumers information and let them decide. The statute is emphatically not about empowering a state agency, prodded by an industry that has no interest besides maintaining profit and market share, to unilaterally decide for all consumers that they would be better off with no information. In stark terms, the agency cannot turn a "right to know" law into a "need to hide" law.

E. There Is No Conflict With Federal Labelling Requirements

Last, a few industry representatives, and the FDA somewhat obliquely, raises potential conflict with federal food labelling laws to justify the proposal. This is a

bogus argument on its face. The statute expressly exempts from the warning requirement any exposures for which federal law preempts any warning requirement. Section 25249.11 provides that the warning requirement does not apply to "[a]n exposure for which federal law governs warning in a manner that preempts state authority."[21] Therefore if federal law does in fact preempt the statute's warning requirement the industry has a complete exemption and no regulatory action is needed. The fact that the industry is before the agency asking for that exemption makes clear that not even they believe there is preemption.

IV. THERE IS NO NEED FOR THE INDUSTRY PROPOSAL

The public and nonpublic actions taken by the industry strongly suggest that the industry in fact does not believe any exemption is necessary. At minimum it suggests a rank level of hypocrisy that needs to be exposed and discarded before this agency takes any action.

A. Industry's Public Inaction Belies the Need for Any Action

It is notable that not a single foodstuff that these commenters could find contains any warning about any chemical that would be affected by the industry proposal for an exemption. Not one. That is, the industry is clamoring for the agency to adopt an exemption from warnings that the

21 Section 25249.10(a).

industry is not in fact giving. For the chemical acrylamide – the impetus for this proposal – its presence in foods was discovered and has been reconfirmed by national and international agencies in certain foods for three years. Yet not one product contains a warning about acrylamide. The data from public sources is as yet spotty. No public source has released comprehensive data on the thousands of consumer food products that might contain acrylamide. Industry unquestionably does have such data.

But since the industry is not in fact providing any warnings, it is difficult if not impossible to determine what the true effect of an exemption would be. And the industry has resolutely refused to share any data with the agency about what levels of what chemicals occur in what foods, or what the consumption data of those foods are, making it impossible to evaluate when and where the exemption might have an effect, or what the collateral public health and consumer choice implications will be.

Where an industry by word and deed demands that an agency act, it is incumbent on that agency to provide as much data and information as possible to inform the agency. Put another way, regulating in the dark is folly. A different formulation might be: 'Since the law already requires warnings, and you are not giving them anywhere, why do you need an exemption?"

B. Industry Representatives Don't Believe An

Exemption Is Legally Necessary

In addition to public actions resulting in not a single warning on any food, industry representatives have simultaneously been clamoring for an exemption that they privately contend they do not need.

Major representatives for the food industry and trade associations that were present at the May 9 workshop have privately opined, but apparently will not say publicly, that they believe the statute and existing regs provide ample legal justification for not giving any warning. Given this dichotomy between their public and private postures, the agency can and must demand that the industry explain its full legal position on whether or not warnings are legally required for acrylamide in food. Publicly they claim they need an exemption; privately they say they already have it.

Again, the agency should not take any action whatsoever unless it is fully informed of the true legal and policy consequences of the action, by the very party calling for action.

V. CONCLUSION

The industry proposal for a blanket exemption for warnings for all chemicals found in food that cause cancer or reproductive harm that result from any form of cooking is untenable. It is legally wrong, controverted by existing judicial decisions, contrary to the will of the voters, based not even on junk science but on no science, and built

upon a logical and factual edifice of no substance.

This agency should politely decline the invitation to a regulatory *cul de sac* that will only distract it and waste precious time and resources; and instead, find ways to address real problems with real solutions for real consumers.

June 6, 2005

_____

James R. Wheaton

President, Environmental Law Foundation

_____

Michael Schmitz,

Executive Director CLEEN

CLEEN COALITION

Altshuler, Berzon, Nussbaum, Rubin & Demain
Baykeeper
Brian Gaffney, Esq.
California Environmental Rights Alliance
Californians for Alternatives to Toxics
Center for Environmental Health
Center on Race Poverty and the Environment
Communities for a Better Environment
Environmental Law Foundation
Ecological Rights Foundation
Michael Freund, Esq.
Lexington Law Group, LLP
Mateel Environmental Justice Foundation
Natural Resources Defense Council
Andrew Packard, Esq.
Physicians for Social Responsibility - Los Angeles
Physicians for Social Responsibility - SF Bay Area
Prof. Cliff Rechtschaffen, Golden Gate University School of Law
The Rose Foundation for Communities and the Environment
Occupational Knowledge